

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Level 3 Communications LLC)	
)	WC Docket No. 03-266
Petition for Forbearance Under)	
47 U.S.C. § 160(c) from Enforcement)	
of 47 U.S.C. § 251(g), Rule 51.701(b)(1))	
and Rule 69.5(b))	
)	

**REPLY COMMENTS OF
BROADWING COMMUNICATIONS, LLC**

I. INTRODUCTION

Broadwing Communications, LLC (“Broadwing”), by its undersigned attorneys, files these reply comments in support of the Petition for Forbearance filed by Level 3 Communications LLC (“Forbearance Petition”) in the above-captioned proceeding.¹ The Federal Communications Commission (“FCC”) should grant the Forbearance Petition because it is narrowly tailored to specific services and would apply to IP-PSTN traffic only until there is comprehensive reform to the intercarrier compensation system. Subjecting IP-PSTN traffic to reciprocal compensation would shield such communications from the irrational access charge regime until that reform is completed. Under the existing intercarrier compensation system, the path a particular communication follows is unrelated to compensation. IP-enabled services are inherently portable and challenge traditional regulatory frameworks. Superimposing an inherently flawed,

¹ See *Pleading Cycle Established for Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications*, Public Notice, WC Docket No. 03-266, (rel. Jan. 2, 2004).

geographic-based, legacy access charge system on non-geographic and innovative IP-enabled services threatens to stifle competition and innovation. Further, IP-PSTN communications are qualitatively different from circuit-switched traffic and are properly classified as information services. As such, the need for government regulation is reduced as the competitive marketplace acts to instill discipline on market participants. It is important for the FCC to act on the Forbearance Petition to create regulatory certainty in the IP-enabled service marketplace and to preserve the status quo.

II. THE PATH OF AN IP-PSTN COMMUNICATION IS IRRELEVANT TO DETERMINING THE APPROPRIATE INTERCARRIER COMPENSATION MECHANISM

As set out in Broadwing's initial comments, the FCC should not subject IP-enabled services to access charges as the existing regime is irrational and inhibits the growth and innovation of IP-enabled services.² While parties filing comments in opposition to the Forbearance Petition argue for the application of access charges to IP-enabled service, none suggest that the access charge system is not in need of reform. Instead, these parties generally argue that access charges should apply to IP-enabled services because the path that such communications follow are similar to routes followed by long-distance communications on the circuit-switched network. For example, Verizon argues that the service described by the Forbearance Petition uses the network in the same manner as any other interexchange carrier.³ Similarly, SBC maintains that an IP-public switched telephone network ("PSTN") communication is a "standard" voice call

² See Comments of Broadwing Communications, LLC, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 4-5, WC Docket No. 03-266 (filed Mar. 1, 2004).

³ See Comments of the Verizon Telephone Companies, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 2-3, 8-10, WC Docket No. 03-266 (filed Mar. 1, 2004).

with no “obvious” changes in form or content.⁴ Joint comments filed on behalf of numerous rural carriers suggest that IP-enabled services should be subject to access charges because such services use the PSTN in a manner that is similar to interexchange carriers.⁵

While Broadwing disagrees with the premise that IP-PSTN traffic is no different than PSTN-PSTN traffic, even assuming, *arguendo*, that such traffic is identical to traditional telephone traffic (which it is not), it does not logically follow that IP-PSTN traffic is or should be subject to the existing access charge regime. Under the current intercarrier compensation system, traffic routed to the same geographic endpoint is subject to different compensation mechanisms depending on a variety of factors including the type of carrier handling the traffic and the classification of the traffic by the parties exchanging traffic. The existing intercarrier compensation regime is an irrational system that treats traffic that follows identical routes disparately for purposes of compensation. The path that a particular communication follows is not determinative of whether access charges apply under the existing access charge regime.

The Forbearance Petition attempts to rectify the current irrational patchwork of intercarrier compensation systems by establishing an interim compensation scheme—that would exist only until the FCC reforms the intercarrier compensation system—applicable to a narrowly defined subset of communications that the FCC has, to date, refused to affirmatively classify as subject to one of the existing compensation mechanisms. For all

⁴ See Opposition of SBC Communications Inc., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 17, WC Docket No. 03-266 (filed Mar. 1, 2004).

⁵ See Comments of The Alabama Mississippi Telecommunications Assoc. *et al.*, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 6-10, WC Docket No. 03-266 (filed Mar. 1, 2004).

of the reasons stated in the Forbearance Petition and supporting comments—including the promotion of development and deployment in IP-enabled services, and regulatory certainty for nascent IP-enabled services, and broadband deployment—the FCC should find that the public interest is served by forbearing from applying access charges to IP-PSTN communications.

III. IP-ENABLED SERVICES TRANSCEND GEOGRAPHY AND THEREFORE RENDER THE ACCESS CHARGE SYSTEM IRRELEVANT

The emergence of IP-enabled services challenges existing regulatory structures on many levels. Perhaps the conflict between legacy regulation of the circuit-switched network and the packet-switched network are most pronounced when one examines the access charge regime. Access charges are assessed on the basis of geography. IP-enabled services transcend geography and enable users to determine the endpoints of communications. Unlike communications in the wireline world, IP-enabled services are not tied to a particular location. While circuit-switched traffic can be tied to a specific location through the use of a telephone number, IP-enabled applications use telephone numbers as a means to establish a link between the PSTN the Internet. As such, wherever high-speed Internet access services are available, an IP-enabled service user can place and receive calls without any link to a geographic location.

The unique portability that IP-enabled services offer was recognized by the FCC in the *Pulver Order*.⁶ The FCC explained that since a user of pulver.com’s service can “initiate and receive on-line communications from anywhere in the world where it can

⁶ See *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, FCC-04-27 (rel. Feb. 19, 2004).

access the Internet via a broadband connection[.]”⁷ it is impossible to distinguish between inter- and intrastate traffic. Indeed, the FCC went so far as to find that the FCC’s “traditional test for determining the boundaries of interstate versus intrastate jurisdiction – the ‘end-to-end’ analysis – is inapplicable in the context of FWD”⁸ Both Level 3⁹ and SBC¹⁰ have recognized that there is no practical way to track the route that packets take when traversing the packet-switched network, nor is there any reason to expend the resources to develop such a system. In light of the fact that IP-enabled services are non-geographic based services that are inherently portable with unknown endpoints, applying access charges to IP-enabled services would result in an illogical and unnecessary regulatory structure where IP-enabled services are compelled to conform to an arbitrary, inherently flawed system that would “forc[e] changes on this service for the sake of regulation itself, rather than for any particular policy purpose.”¹¹

IV. THE FCC NEED NOT DECIDE WHETHER IP-PSTN TRAFFIC QUALIFIES FOR THE ESP EXEMPTION

In the Forbearance Petition, Level 3 explains that it is not conceding that access charges apply to IP-PSTN communications; rather, the purpose of the Forbearance Petition is to eliminate any regulatory uncertainty concerning the application of access charges to such communications.¹² While many parties agree that IP-PSTN traffic is properly classified as an enhanced or information service, it is not necessary for the FCC

⁷ *Id.* at ¶ 22.

⁸ *Id.* at ¶ 16.

⁹ See Petition for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (filed Dec. 23, 2003) (“Level 3 Petition”).

¹⁰ Petition of SBC Communications Inc. for Forbearance, *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services* at 37, WC Docket No. 04-29 (filed Feb. 5, 2004) (“SBC Petition”).

¹¹ *Id.* at ¶ 21.

¹² See Level 3 Petition at 9-10.

to reach this conclusion in the context of the Forbearance Petition. AT&T emphasizes that under existing federal law, access charges do not apply to IP-PSTN traffic because such services are properly characterized as enhanced services under federal law.¹³ The comments filed by the CompTel/Ascent Alliance highlight the fact that access charges have never applied to the services described in the Forbearance Petition.¹⁴ Similarly, Global Crossing maintains that IP-based services have historically been subject to the FCC's *Enhanced Service Provider Exemption* and thus exempt from access charges.¹⁵ Likewise, ICG explains that computer-to-phone (IP-to-PSTN) services are enhanced services and therefore not subject to access charges.¹⁶ MCI underscores the fact that the FCC has always classified enhanced service providers as end users of telecommunications services and, as such, the access charge regime is inapplicable.¹⁷ SBC agrees that "the VoIP services described by Level 3 in its petition should be treated as information services when Level 3, or anyone else, provides those services to their IP

¹³ See Comments of AT&T Corp., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 10-15, WC Docket No. 03-266 (filed Mar. 1, 2004).

¹⁴ See Comments of the CompTel/Ascent Alliance, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 2-3, WC Docket No. 03-266 (filed Mar. 1, 2004).

¹⁵ See Comments of Global Crossing North America Inc., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 7-10, WC Docket No. 03-266 (filed Mar. 1, 2004).

¹⁶ See Comments of ICG Telecom Group, Inc., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 2-6, WC Docket No. 03-266 (filed Mar. 1, 2004).

¹⁷ See Comments of MCI, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 3-5, WC Docket No. 03-266 (filed Mar. 1, 2004).

customers.”¹⁸ USA Datanet points out that the FCC has never applied access charges to the traffic that is the subject of the Forbearance Petition.¹⁹

It is clear that these parties, with the exception of SBC, support forbearance. By arguing that IP-PSTN services are enhanced or information services, these parties are recognizing that these services should be subject to less regulatory burdens. But granting the Forbearance Petition would not require the FCC to determine whether IP-PSTN communications qualify for the Enhanced Service Provider exemption. Instead, the Forbearance Petition asks the FCC to find that assessing access charges on the traffic detailed in the Forbearance Petition is not in the public interest, not necessary to protect consumers, and not required to ensure that the charges and practices of IP-PSTN providers are just and reasonable.

The competitive marketplace for information or enhanced services is robust. Historically, common carrier regulation evolved because telecommunications services were provided by a company that held a monopoly position in the marketplace. Regulation was essential to protect consumers and meet social goals. There is less need for government regulation when a market is competitive. Since consumers can choose service providers, the laws of supply and demand act to root out bad actors and to encourage innovation and investment. Competition also delivers the most efficient service at the lowest price and presents consumers with the most options. As such, forbearance would not harm the public interest, is not required to ensure consumer

¹⁸ See Opposition of SBC Communications Inc., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 9, WC Docket No. 03-266 (filed Mar. 1, 2004).

¹⁹ See Comments of USA Datanet Corporation, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 4-6, WC Docket No. 03-266 (filed Mar. 1, 2004).

protection, nor is there any need to regulate the charges and practices of the service providers that offer enhanced services. Competition is the public interest as it is the best guardian of consumers and disciplines market actors so that their charges and practices are reasonable.

V. IMMEDIATE FCC ACTION IS NECESSARY TO REMOVE REGULATORY UNCERTAINTY AND TO ENCOURAGE INVESTMENT

The FCC should grant the Forbearance Petition because it would add certainty to the marketplace for IP-enabled services. As demonstrated by the comments of a number of parties, unilateral, self-help measures by ILECs are harming the innovative service offerings of new entrants and chilling investment in IP-enabled services.²⁰ The mere threat of retroactive liability for access charges impedes investment in IP-enabled services and stifles innovation. In granting the Forbearance Petition, the FCC would establish a transitional compensation method applicable to IP-enabled services until such time as the FCC completes its intercarrier compensation and IP-enabled services rulemakings. Interim forbearance will foster investment in IP-enabled services, catalyze innovation and the enhancement of such services.²¹ IP-enabled communications services may be the “killer application” that both increases demand for broadband applications and promotes investment in broadband networks. By granting the Forbearance Petition and maintaining the status quo, the FCC would create a regulatory environment that allows such services to flourish. The FCC should reject the recommendations made by a

²⁰ See, e.g., *Global Crossing Comments*, at 4-7; *ICG Telecom Group, Inc. Comments*, at 3-4; *USA Datanet Comments*, at 7-8.

²¹ See, e.g., *Broadwing Comments*, at 3-4; *CompTel/Ascent Comments*, at 4-6; *Global Crossing Comments*, at 4-7; *ICG Comments*, at 6-7; *MCI Comments*, at 5-7; Comments of Pinpoint Communications Inc., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 2-4, WC Docket No. 03-266 (filed Mar. 1, 2004); Comments of the Progress and Freedom Foundation, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 2-3, WC Docket No. 03-266 (filed Mar. 1, 2004).

number of parties to defer consideration of the Forbearance Petition.²² Delay serves the interest of legacy providers of traditional telephone service and hampers investment in IP-enabled services.

VI. CONCLUSION

Contrary to arguments made by a number of parties, the existing access charge regime is unrelated to the path a communications follows. Access charges apply based on a myriad of factors including the type of carrier originating or terminating the traffic and the classification of the traffic by the parties. The appropriate regulatory classification of IP-PSTN traffic is not at issue in the Forbearance Petition and granting the Forbearance Petition would preserve the status quo. Due to the inherently portable nature of IP-enabled services and the lack of geographic information about the endpoint of such communications, applying access charges to such services is illogical and counterproductive. Certain regulatory structures like access charges simply cannot be superimposed in a rational manner on new IP-enabled technologies and services. It is important for the FCC to act on the Forbearance Petition to remove regulatory

²² See, e.g., America's Rural Consortium Comments in Opposition to the Level 3 Petition, *In the Matter of Level 3 Petition for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications* at 8-9, WC Docket No. 03-266 (filed Feb. 27, 2004); Comments of BellSouth, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 17-20, WC Docket No. 03-266 (filed Mar. 1, 2004); Comments of GVNW Consulting, Inc., *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 3-4, WC Docket No. 03-266 (filed Mar. 1, 2004); Comments of the ICORE Companies, *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 5, WC Docket No. 03-266 (filed Mar. 1, 2004); Comments of The Iowa Utilities Board, *In the Matter of Level 3 Communication LLC's Petition for Forbearance* at 3, WC Docket No. 03-266 (filed Mar. 1, 2004); Comments of Supra Telecom Telecommunications and Information Systems, Inc Opposing Level 3's Petition for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b), and Rule 69.5(b), *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)* at 4-5, WC Docket No. 03-266 (filed Mar. 1, 2004).

uncertainty so that IP-enabled services flourish. For these reasons, the FCC should grant the Forbearance Petition.

Respectfully submitted,

/s/ Ronald W. Del Sesto, Jr.

Andrew D. Lipman

Ronald W. Del Sesto, Jr.

Attorneys for Broadwing Communications, LLC

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